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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO.

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN

Petitioner,

v.

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, School District of the City of Birmingham, respectfully prays that a Writ of Certiorari issue, to review an Order of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause denying Petitioner's Petition For Writ of Prohibition and/or Mandamus and from its Order Denying the Petition For Rehearing.

OPINIONS BELOW

The opinions rendered in the District Court and in the Court of Appeals for the Sixth Circuit below are:

A. Ruling of June 14, 1972 of the Trial Judge, Honorable Stephen J. Roth, District Judge for the Eastern District of Michigan, Southern Division, a copy of which is attached as Appendix A.

B. Order of July 20, 1972, of the Trial Judge, Honorable Stephen J. Roth, District Judge for the Eastern District of Michigan, Southern Division, a copy of which is attached as Appendix B.

C. Order of the Court of Appeals for the Sixth Circuit, of August 7, 1972, denying Petition For Writ of Prohibition and/or Mandamus, a copy of which is attached as Appendix D.

D. Order of the Court of Appeals for the Sixth Circuit, of September 5, 1972, denying Petition For Rehearing of Petition For Writ of Prohibition and/or Mandamus, a copy of which is attached as Appendix F.

JURISDICTION

The Order denying the Petition For Writ of Prohibition and/or Mandamus was entered on August 7, 1972. A Petition For Rehearing was timely filed. The Order denying Petition For Rehearing was entered on September 5, 1972. The jurisdiction of this Court to issue the requested Writ of Certiorari is conferred by 28 U.S.C. Sec. 1254(1) .

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err by including the School District of the City of Birmingham in its desegregation order where said School District has not been served with process, is not a party to the litigation, and has not intervened therein?

2. Did the District Court err by including the School District of the City of Birmingham within the scope of its desegregation order where the Court's findings of segregation are limited to policies and practices solely within the City of Detroit School District and where neither the State of Michigan nor the School District of the City of Birmingham are parties to, or intervenors in, said litigation from which the challenged order flows?

3. Did the Court of Appeals err by denying the Petition For A Writ of Prohibition and/or Mandamus?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the Constitution of the United States at issue herein are as follows:

ARTICLE III

SECTION 2. The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States;--between a State and Citizens of another State;-- between Citizens of different states, -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 19 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not

deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.***

2. The provisions of the Constitution of the State of Michigan at issue are as follows:

ARTICLE VIII

SECTION 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

3. The Statute of the State of Michigan at issue is as follows:

Act 269 of Public Acts of Michigan of 1955, as amended (MCLA 340.1, et seq).

a. Section 352 (MCLA 340.352, MSA 15.3352)

"Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gift, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district existing within the same territorial limits and shall be

vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law."

STATEMENT OF CASE

Petitioner is a Michigan Municipal Corporation and School District of the Third Class, organized and existing under the Constitution and laws of the State of Michigan. The Petitioner is vested by the laws of Michigan with independent, legal status, and maintains an educational program for approximately 16,600 students. The School District is located in Oakland County, outside of the City of Detroit.

In August of 1970, certain Plaintiffs (Ronald Bradley, et al.) commenced a suit against the Detroit Board of Education and certain State officers seeking a judgment that Act 48 of Public Acts of 1970 of the State of Michigan be declared unconstitutional and requesting that Detroit School District be operated as a unitary system. Petitioner was not named as a party in such litigation, was not served with process, and was not a participant in the proceedings.

On September 27, 1971, the Honorable Stephen J. Roth, U.S. District Judge, issued a Ruling on Issue of Segregation in *Bradley, et al.* v. *Milliken, et al.*, (338 F. Supp. 582, 594, [E.D. Mich., 1971]) finding a "*de jure* segregated school system in operation in the City of Detroit". The ruling was limited to the finding that illegal segregation exists in the public schools of the City of Detroit.

On June 14, 1972, the District Court entered an Order in

Bradley denominated Ruling on Desegregation Area and Order for Development of Plan of Desegregation (345 F.Supp. 914 [E.D. Mich., 1972]) which, *inter alia*, mandates pupil reassignment to accomplish desegregation of the Detroit public schools within a geographical area encompassing Detroit and some 53 additional school districts (including Petitioner) which are all outside the limits of the Detroit School District.

The Petitioner was included in the "Metropolitan" desegregation area notwithstanding the fact that: (1) Petitioner is not and never has been a party to the above proceedings; (2) no claim has been made and no finding of the District Court suggests that Petitioner has committed any act of *de jure* segregation or that the failure to maintain a unitary system in Detroit was caused by or is attributable to the Petitioner.

The Petitioner is not a party to the litigation; nor did the Petitioner intervene therein.

Nonetheless, Petitioner was included in the "desegregation area" and ordered to "cooperate fully" with a Court-selected panel of individuals who were charged by the District Court with the responsibility of developing details of the desegregation plan for the area delineated by the District Court in its June 14, 1972 Order (Appendix A, Page 4a). Petitioner was ordered to pay the costs of its employees' assistance to such panel and participate in the reassignment of pupils within the "desegregation area".

On July 20, 1972, the District Court ordered the entry of judgments in accordance with the provisions of Federal Rules of Civil Procedure 54(b) and for certification under the provisions of 28 U.S.C. 1292(b) of certain of its rulings and orders, one of which was its order of June 14, 1972 (Appendix B). The determination of finality as to certain orders entered therein, enabled the parties to that cause to take an appeal. Petitioner, a non-party, had no right to appeal in *Bradley*.

There is an irreconciable conflict between the Birmingham School District's statutory authority and the terms of the District Court's Order of June 14, 1972 (Appendix C, pages 16a-18a) The June 14, 1972 Order, as a final judgment, is a final ruling *inter alia*

that the Birmingham School District may be validly ordered to relinquish its specific statutory powers and validly ordered to participate in a cross-district bussing plan regardless of the fact that it has at no time been a party to the proceedings.

The Petitioner respectfully submits that its inclusion in the desegregation area and its ordered participation in the desegregation plan abrogates powers conferred and duties imposed upon it by the Constitution and laws of the State of Michigan. Such a modification of the Petitioner's rights and interests without notice, without service of process, and without a hearing on the merits constitutes a denial of constitutional guarantees to due process.

REASONS FOR GRANTING THE WRIT

[For purposes of brevity, Questions I and II presented for review are treated collectively.]

The Petitioner, School District of the City of Birmingham, has been included in the "Metropolitan" desegregation area and made subject to the June 14, 1972 Ruling and Order in *Bradley* even though the School District was never a party to those proceedings. It is submitted that the District Court erred by including the Petitioner within its remedial order.

It is submitted that it has long been settled that a Federal District Court must have jurisdiction over those parties whose interests are to be affected by the relief to be granted in the final decree. Such parties are indispensable, or at least necessary, to the proceedings. *Shields* v. *Barrow*, 17 How. 129, 139, 15 L.Ed. 158 (1854), cited with approval in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U.S. 33, 48, 30 S.Ct. 10, 54 L.Ed. 80 (1909), and *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 80, 41 S.Ct. 39 (1920). *Atwood* v. *National Bank of Lima*, 115 F.2d 861 (6th Cir., 1940). *Bell* v. *School Board of Powhatan County, Va.*, 321 F.2d 494, (4th Cir., 1963). Rule 19, Federal Rules of Civil Procedure, Title 28, U.S.C. Such rule is reflective of the party's right to notice and due process and the limitations upon the jurisdiction of the District Court.

In determining whether a party is indispensable, the Court

must initially determine the nature and extent of the party's interests. The rights and interests of parties are to be determined under the state's substantive law. *Hertz* v. *Record Publishing Company of Erie*, 219 F.2d 397,400, (3rd Cir., 1955), cert. denied 349 U.S. 912, 75 S.Ct. 601, 99 L.Ed. 1247, (1955). *Thaxton* v. *Vaughn*, 321 F.2d 474 (4th Cir., 1963). *Covington* v. *Edwards*, 264 F.2d 780 (4th Cir., 1959). *Jet* v. *Zink*, 362 F.2d 723, (5th Cir., 1966). *McKissich* v. *Durham City Board of Education*, 176 F.Supp. 3, (M.D.N.C., 1959). *Jeffers* v. *Whitley*, 165 F.Supp. 951, 955 (N.D.N.C., 1958).

It is thus submitted that the laws of the State of Michigan are determinative of whether the Petitioner is vested with such rights and interests that it was an indispensable party to the proceedings which resulted in the June 14, 1972 Ruling and Order.

The laws of the State of Michigan clearly provide that School Districts are public corporate bodies empowered to sue and be sued, acquire, hold, and convey real and personal property and exercise general plenary power over the educational system within its boundaries. M.C.L.A. §340.352; M.S.A. §15.3352; *Marathon School District No. 4* v. *Gage*, 39 M. 484 (1878); *Public Schools of Battle Creek* v. *Kennedy*, 245 M. 585 (1929); *King* v. *School District No. 5*, 261 M. 604 (1933). Illustrations of such plenary powers are set forth in Appendix C, Pages 21a-22a).

It is specifically noted at this juncture that the State Board of Education is charged by the Michigan Constitution with the:

> "leadership and general supervision over all public education . . . [and is to serve as] the general planning and coordinating body of all public education . . ." Michigan Constitution, Article VII, §3, (1963)

But there is a clear dichotomy between the general supervisory authority vested in the State Board of Education and the Superintendent of Public Instruction, and the specific and detailed authority vested exclusively in the school districts. (Appendix C, pages 21a-22a).

The distinctions drawn, and the limitations imposed, by state law in this regard must be observed by the District Court.

Covington v. *Edwards*, 264 F.2d 780, 783 (4th Cir., 1959). *Bell* v. *School Board of Powhatan County, Va.*, 321 F.2d 494, 499 (4th Cir., 1963). *Jeffers* v. *Whitley*, 165 F.Supp. 951, 955 (N.D.N.C., 1958). *Bradley* v. *School Board of Richmond, Virginia*, 51 F.R.D. 139, 143 (E.D. Va., 1970) rev'd. on other grounds 462 F.2d 1058 (4th Cir., 1972). c.f. *Thaxton* v. *Vaughan*, 321 F.2d 474 (4th Cir., 1963).

The state law determines the repository of the specific powers and interests at issue, and in analogous situations it has been held that the indispensable party is the state agency or subdivision which has the specific authority to make pupil assignments and exercise other specific powers necessary to effectuate the dictates of a remedial order. The Petitioner is vested with such authority with respect to the students being educated within its geographical borders. There is an irreconciliable conflict between the District Court's June 14, 1972 Ruling and Order and Petitioner's rights and powers established by the laws of Michigan. Illustrations of such conflicts are set forth in Appendix C, pages 16a-18a.

It is respectfully submitted that only the Birmingham School District has the specific statutory authority to make pupil assignments and exercise the other specific powers necessary to effectuate the District Court's Order of June 14, 1972. It is further submitted that the broad powers and interests vested by state law in the Birmingham School District were affected by the District Court's June 14, 1972 Order in such a severe and substantial manner that it was an indispensable party to the proceedings.

It is undisputed that the Birmingham School District is not, and never has been, a party to *Bradley*. Nor is the State of Michigan a party to this litigation. The Officers of the State, including the Governor, Attorney General, Treasurer, and Superintendent of Public Instruction are not vested with any plenary powers with regard to Petitioner and, as noted above, while the State Board of Education is given the responsibility of general supervision and leadership, the school districts alone are given the plenary power to operate the school system.

It is therefore submitted that the State Board of Education and the Acting Superintendent of Public Instruction are not the *alter ego* of the Fifty-Three (53) school districts sought to be bound by the Court's June 14, 1972 Order and, under state law, jurisdiction over the current State Defendants does not confer, nor may it stand in the place of, jurisdiction over the Birmingham School District. The Petitioner's rights to notice and hearing on the merits are independent from those of the current State Defendants.

* * *

The Birmingham School District submits that District Court has exceeded the lawful existence of its prescribed jurisdiction and seeks the Writs traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21 (1943) at 26. The totally unknown effects which massive tri-county bussing may have upon the education and safety of the school children involved in the June 14, 1972 Order, as well as the indeterminable cost in time and dollars of the Order's implementation, make this matter of "public importance" and thus a "case appropriate for the extraordinary writs". *Morrow* v. *District of Columbia*, 417 F.2d 728 (C.A.D.C., 1969), at 736, 737.

The extraordinary writs are the only viable remedy open to Petitioner. Attempted intervention in the proceedings at this time, even if successful, would provide no relief, since the District Court has already proceeded to a final judgment that the Birmingham School District is to be included in the "desegregation area". The principal case of *Bradley, et al.* v. *Milliken, et al.*, has been appealed to the United States Court of Appeals for the Sixth Circuit and bears Docket No. 72-8002. Oral arguments were held in the principal litigation on August 24, 1972. Because it is not a party, Petitioner may not appeal Respondent's June 14, 1972 Ruling and Order and was not a participant in that appeal. The Birmingham School District should not be deprived of its rights, under the rules of procedural due process, to a fair hearing in this matter.

Conclusion

For the reasons set forth above, Petitioner prays for the issuance of Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

THOMAS H. SCHWARZE and
CHARLES E. KELLER
Attorneys for Petitioner,
School District of the City of
Birmingham, Michigan

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., Plaintiffs v. WILLIAM G. MILLIKEN, et al., Defendants and DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Defendant-Intervenor and DENISE MAGDOWSKI, et al., Defendants-Intervenor *et al.*	CIVIL ACTION No. 35257

RULING ON DESEGREGATION AREA
AND
ORDER FOR DEVELOPMENT OF PLAN OF DESEGREGATION

On September 27, 1971 the court made its Ruling on Issue of Segregation, holding that illegal segregation exists in the public schools of the City of Detroit as a result of a course of conduct on the part of the State of Michigan and the Detroit Board of Education. Having found a constitutional violation as established, on October 4, 1971 the court directed the school board defendants, City and State, to develop and submit plans of desegregation, designed to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. The directive called for the submission of both a

"Detroit-only" and a "Metropolitan" plan.

Plans for the desegregation of the Detroit schools were submitted by the Detroit Board of Education and by the plaintiffs. Following five days of hearings the court found that while plaintiffs' plan would accomplish more desegregation than now obtains in the system, or which would be achieved under either Plan A or C of the Detroit Board of Education submissions, none of the plans would result in the desegregation of the public schools of the Detroit school district. The court, in its findings of fact and conclusions of law, concluded that "relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city," and that it had the authority and the duty to look beyond such limits for a solution to the illegal segregation in the Detroit public schools. Accordingly, the court ruled, it had to consider a metropolitan remedy for segregation.

The parties submitted a number of plans for metropolitan desegregation. The State Board of Education submitted six - without recommendation, and without indication any preference. With the exception of one of these, none could be considered as designed to accomplish desegregation. On the other hand the proposals of intervening defendant Magdowski, et al., the Detroit Board of Education and the plaintiffs were all good faith efforts to accomplish desegregation in the Detroit metropolitan area. The three plans submitted by these parties have many similarities, and all of them propose to incorporate, geographically, most–and in one instance, all–of the three-county area of Wayne, Oakland and Macomb.

The hearing on the proposals have set the framework, and have articulated the criteria and considerations, for developing and evaluating an effective plan of metropolitan desegregation. None of the submissions represent a complete plan for the effective and equitable desegregation of the metropolitan area, capable of implementation in its present form. The court will therefore draw upon the resources of the parties to devise, pursuant to its direction, a constitutional plan of desegregation of the Detroit public schools.

Based on the entire record herein, the previous oral and written rulings and orders of this court, and the Findings of Fact and Conclusions of Law filed herewith, IT IS ORDERED:

I.

A. As a panel charged with the responsibility of preparing and submitting an effective desegretation plan in accordance with the provisions of this order, the court appoints the following:

1. A designee of the State Superintendent of Public Instruction;*

2. Harold Wagner, Supervisor of the Transportation Unit in the Safety and Traffic Education Program of the State Department of Education;

3. Merle Henrickson, Detroit Board of Education;

4. Aubrey McCutcheon, Detroit Board of Education;

5. Freeman Flynn, Detroit Board of Education;

6. Gordon Foster, expert for plaintiffs;

7. Richard Morshead, representing defendant Magdowski, et al.;

8. A designee of the newly intervening defendants;*

9. Rita Scott, of the Michigan Civil Rights Commission.

Should any designated member of this panel be unable to serve, the other members of the panel shall elect any necessary replacements, upon notice to the court and the parties. In the absence of objections within five days of the notice, and pending a final ruling, such designated replacement shall act as a member of the panel.

---

*The designees of the State Superintendent of Public Instruction and newly intervening defendants shall be communicated to the court within seven days of the entry of this order. In the event the newly intervening defendants cannot agree upon a designee, they may each submit a nominee within seven days from the entry of this order, and the court shall select one of the nominees as representative of said defendants.

B. As soon as possible, but in no event later than 45 days after the issuance of this order, the panel is to develop a plan for the assignment of pupils as set forth below in order to provide the maximum actual desegregation, and shall develop as well a plan for the transportation of pupils, for implementation for all grades, schools and clusters in the desegregation area. Insofar as required by the circumstances, which are to be detailed in particular, the panel may recommend immediate implementation of an interim desegregation plan for grades K-6, K-8 or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term. In its transportation plan the panel shall, to meet the needs of the proposed pupil assignment plan, make recommendations, including the shortest possible timetable, for acquiring sufficient additional transportation facilities for any interim or final plan of desegregation. Such recommendations shall be filed forthwith and in no event later than 45 days after the entry of this order. Should it develop that some additional transportation equipment is needed for an interim plan, the panel shall make recommendations for such acquisition within 20 days of this order.

C. The parties, their agents, employees, successors and all others having actual notice of this order shall cooperate fully with the panel in their assigned mission, including, but not limited to, the provision of data and reasonable full and part-time staff assistance as requested by the panel. The State defendants shall provide support, accreditation, funds, and otherwise take all actions necessary to insure that local officials and employees cooperate fully with the panel. All reasonable costs incurred by the panel shall be borne by the State defendants; provided, however, that staff assistance or other services provided by any school district, its employees or agents, shall be without charge, and the cost thereof shall be borne by such school district.

II.

A. Pupil reassignment to accomplish desegregation of the Detroit public schools is required within the geographical area which may be described as encompassing the following school districts (see Exhibit P.M. 12), and hereinafter referred to as the "desegregation area":

Lakeshore	Birmingham	Fairlane
Lakeview	Hazel Park	Garden City
Roseville	Highland Park	North Dearborn Heights
South Lake	Royal Oak	Cherry Hill
East Detroit	Berkley	Inkster
Grosse Pointe	Ferndale	Wayne
Centerline	Southfield	Westwood
Fitzgerald	Bloomfield Hills	Ecorse
Van Dyke	Oak Park	Romulus
Fraser	Redford Union	Taylor
Harper Woods	West Bloomfield	River Rouge
Warren	Clarenceville	Riverview
Warren Woods	Farmington	Wyandotte
Clawson	Livonia	Allen Park
Hamtramck	South Redford	Lincoln Park
Lamphere	Crestwood	Melvindale
Madison Heights	Dearborn	Southgate
Troy	Dearborn Heights	Detroit

Provided, however, that if in the actual assignment of pupils it appears necessary and feasible to achieve effective and complete racial desegregation to reassign pupils of another district or other districts, the desegregation panel may, upon notice to the parties, apply to the Court for an appropriate modification of this order.

B. Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom be substantially disproportionate to the overall pupil racial composition. The panel may, upon notice to the parties, recommend reorganization of clusters within the desegregation area in order to minimize administrative inconvenience, or time and/or numbers of pupils requiring transportation.

C. Appropriate and safe transportation arrangements shall be made available without cost to all pupils assigned to schools deemed by the panel to be other than "walk-in" schools.

D. Consistent with the requirements of maximum actual desegregation, every effort should be made to minimize the numbers of pupils to be reassigned and requiring transportation, the time pupils spend in transit, and the number and cost of new transportation facilities to be acquired by utilizing such techniques as clustering, the "skip" technique, island zoning, reasonable

staggering of school hours, and maximization of use of existing transportation facilities, including buses owned or leased by school districts and buses operated by public transit authorities and private charter companies. The panel shall develop appropriate recommendations for limiting transfers which affect the desegregation of particular schools.

E. Transportation and pupil assignment shall, to the extent consistent with maximum feasible desegregation, be a two-way process with both black and white pupils sharing the responsibility for transportation requirements at all grade levels. In the determination of the utilization of existing, and the construction of new, facilities, care shall be taken to randomize the location of particular grade levels.

F. Faculty and staff shall be reassigned, in keeping with pupil desegregation, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

G. In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

H. The restructuring of school facility utilization necessitated by pupil reassignments should produce schools of substantially like quality, facilties, extra-curricular activities and staffs; and the

utilization of existing school capacity through the desegregation area shall be made on the basis of uniform criteria.

I. The State Board of Education and the State Superintendent of Education shall with respect to all school construction and expansion, "consider the factor of racial balance along with other educational considerations in making decisions about new school sites, expansion of present facilties * * *"; and shall, within the desegregation area disapprove all proposals for new construction or expansion of existing facilties when "housing patterns in an area would result in a school largely segregated on racial * * * lines," all in accordance with the 1966 directive issued by the State Board of Education to local school boards and the State Board's "School Plant Planning Handbook" (see Ruling on Issue of segregation, p. 13.).

J. Pending further orders of the court, existing school district and regional boundaries and school governance arrangements will be maintained and continued, except to the extent necessary to effect pupil and faculty desegregation as set forth herein; provided, however, that existing administrative, financial, contractual, property and governance arrangements shall be examined, and recommendations for their temporary and permanent retention or modification shall be made, in light of the need to operate an effectively desegregated system of schools.

K. At each school within the desegregated area provision shall be made to insure that the curriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents.

L. The defendants shall, to insure the effective desegregation of the schools in the desegregation area, take immediate action including, but not limited to, the establishment or expansion of in-service training of faculty and staff, create bi-racial committees, employ black counselors, and require bi-racial and non-discriminatory extra-curricular activities.

III.

The State Superintendent of Public Instruction, with the

assistance of the other state defendants, shall examine, and make recommendations, consistent with the principles established above, for appropriate interim and final arrangements for the (1) financial, (2) administrative and school governance, and (3) contractual arrangements for the operation of the schools within the desegregation area, including steps for unifying, or otherwise making uniform the personnel policies, procedures, contracts, and property arrangements of the various school districts.

Within 15 days of the entry of this order, the Superintendent shall advise the court and the parties of his progress in preparing such recommendations by filing a written report with the court and serving it on the parties. In not later than 45 days after the entry of this order, the Superintendent shall file with the court his recommendations for appropriate interim and final relief in these respects.

In his examination and recommendations, the Superintendent, consistent with the rulings and orders of this court, may be guided, but not limited, by existing state law; where state law provides a convenient and adequate framework for interim or ultimate relief, it should be followed, where state law either is silent or conflicts with what is necessary to achieve the objectives of this order, the Superintendent shall independently recommend what he deems necessary. In particular, the Superintendent shall examine and choose one appropriate interim arrangement to oversee the immediate implementation of a plan of desegregation.

IV.

Each party may file appropriate plans or proposals for inclusion in any final order which may issue in this cause. The intent of this order is to permit all the parties to proceed apace with the task before us: fashioning an effective plan for the desegregation of the Detroit public schools.

Fifteen days after the filing of the reports required herein, hearings will begin on any proposal to modify any interim plan prepared by the panel and all other matters which may be incident to the adoption and implementation of any interim plan of desegregation submitted. The parties are placed on notice that they are to be prepared at that time to present their objections,

alternatives and modifications. At such hearing the court will not consider objections to desegregation or proposals offered "instead" of desegregation.

Hearings on a final plan of desegregation will be set as circumstances require.

DATE: JUNE 14, 1972.

/s/ Stephen J. Roth
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RONALD BRADLEY, et al., **Plaintiffs** **v.** **WILLIAM G. MILLIKEN, et al.,** **Defendants** **DETROIT FEDERATION OF TEACHERS LOCAL NO. 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,** **Defendant-Intervenor** **and** **DENISE MAGDOWSKI, et al.,** **Defendants-Intervenor** ***et al.***	**CIVIL ACTION NO. 35257**

ORDER

At a session of said court held in the Federal Building, City of Flint, County of Genesee, on this 19th day of JULY, A.D. 1972.

PRESENT: HONORABLE STEPHEN J. ROTH, United States District Judge.

This court having heard oral motions on July 19, 1972, for entry of judgments in accordance with the provisions of Fed. R. Civ. P. 54(b) and for certification under the provisions of 28 U.S.C. 1292(b) in connection with certain orders and rulings of the court heretofore entered; the court determines for the pur-

pose of appeal, and subject to this court's statements at the hearing on July 19, 1972, that there is no just reason for delay and that each of the following orders:

1. Ruling on Issue of Segregation, September 27, 1971;
2. Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, March 24, 1972;
3. Findings of Fact and Conclusions of Law on Detroit-only Plans of Desegregation, March 28, 1972;
4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in Support thereof, June 14, 1972; and
5. Order for Acquisition of Transportation, July 11, 1972

shall be deemed final orders under Rule 54(b) of the Federal Rules of Civil Procedure and the court certifies the issues presented therein under the provisions of 28 U.S.C. 1292(b).

/s/ Stephen J. Roth
United States District Judge

DATE: July 20, 1972
TIME: 8:30 a.m.

APPENDIX C

UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN, Petitioner, -vs- THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, Respondent.	No.

PETITION FOR WRIT OF PROHIBITION
AND/OR MANDAMUS

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UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN, **Petitioner,** **-vs-** **THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,** **Respondent.**	**No.**

PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES the School District of the City of Birmingham, Oakland County, Michigan, (hereinafter referred to as the Birmingham School District), by its attorneys, Keller, Thoma, McManus, Toppin & Schwarze, and petitions this Court, pursuant to Section 1651 of Title 28 of the United States Code and Rule 21 of the Federal Rules of Appellate Procedure, to issue a Writ of Prohibition and/or Mandamus directed to Respondent, Stephen J. Roth, Judge of the United States District Court for the Eastern District of Michigan, and does respectfully show unto this Honorable Court as follows:

I. STATEMENTS OF FACTS

Petitioner is a School District organized under the laws of the State of Michigan, more specifically Act 269 of Public Acts of 1955 as amended, M.C.L.A. 340.1, et seq., and M.S.A. 15.3001, et seq., and is classified as a third class district. Petitioner owns and maintains Two (2) Senior High Schools, Five (5) Junior High Schools, and Eighteen (18) Elementary Schools. During the

1971-72 school year, Petitioner had an enrollment of Sixteen Thousand Six Hundred Thirty-Six (16,636) students, Seven Thousand Eight Hundred Ninety-Two (7,892) of whom were in grades K-6.

Litigation, hereinafter more completely identified in Exhibit "A" attached hereto, and for brevity referred to herein as *Bradley, et al.* v. *Milliken, et al.*, being Civil Action No. 35257 in the United States District Court for the Eastern District of Michigan, Southern Division, was commenced on August 18, 1970, by filing of a Complaint which alleged the unconstitutionality of a Michigan Statute which was applicable only to the City of Detroit School District and further claimed that Plaintiffs' constitutional rights were violated because of the segregated pattern of pupil assignments and racial identifiability of schools within the City of Detroit School System. The Complaint has never been amended and at no time have the pleadings alleged that any school system other than the Detroit system has failed to maintain a unitary system of schools. A trial on the question of *de jure* segregation in the Detroit schools was held in Respondent's Court and concluded on July 22, 1971. On September 27, 1971, Respondent entered his "Ruling on Issue of Segregation" which was limited to the finding that illegal segregation exists in the public schools of the City of Detroit. Notwithstanding these limitations on its own findings, the District Court on March 28, 1972, announced that a "Metropolitan Plan" would be required to accomplish desegregation of the Detroit School District. Thereafter, on June 14, 1972, the District Court entered its Order identifying the "de-segregation area" along with some Fifty-Three (53) other school districts all outside the limits of the Detroit School District.

On July 20, 1972, the District Court ordered the entry of judgments in accordance with the provisions of Federal Rules of Civil Procedure 54(b) and for certification under the provisions of 28 U.S.C. 1292(b) of certain of its rulings and orders, one of which was its order of June 14, 1972 (see Exhibit "C", ¶4).

Petitioner is not, and has not been, a party to the above proceedings, nor has any claim ever been made that Petitioner has committed any act of *de jure* segregation. Nonetheless, Petitioner was included in the "desegregation area" and ordered to "cooper-

ate fully"[1] with a Court-selected panel of individuals who were charged by the District Court with the responsibility of developing details of the de-segregation plan for the area delineated by the District Court in its June 14, 1972, Order. The District Court empowered the panel to

> "recommend immediate implementation of an interim de-segregation plan for grades K-6, K-8, or K-9 in all or in as many clusters as practicable, with complete and final desegregation to proceed in no event later than the fall 1973 term."[2]

II. STATEMENT OF ISSUES PRESENTED

A. WAS, AND IS, THE PETITIONER AN INDISPENSABLE PARTY TO THE PROCEEDINGS IN THE DISTRICT COURT?

Petitioner submits that the answer should be in the affirmative.

B. DID THE DISTRICT COURT HAVE JURISDICTION OVER THE PETITIONER?

Petitioner submits that the answer should be in the negative.

C. DID THE RESPONDENT'S JUNE 14, 1972 ORDER, AND WOULD ENFORCEMENT OF THE ORDER, DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW AND CONTRAVENE THE FEDERAL RULES OF CIVIL PROCEDURE, TITLE 28 U.S.C.?

Petitioner submits that the answer should be in the affirmative.

III. STATEMENT OF THE CASE

It is submitted that the District Court's Order of June 14, 1972 is void as applied to the Birmingham School District because it deprives the Birmingham School District of its authority, rights, and interests, vested by state law, in disregard of the Federal Rules of Civil Procedure and the rules of procedural due process.

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1 Reference, Exhibit "B": ¶1.C.

2 Reference, Exhibit "B", ¶1.B.

Specifically, the June 14, 1972, Order calls for the exercise of powers by the Court-appointed panel which, under the laws of the State of Michigan, are clearly and specifically reserved to the respective school districts. The implementation of the June 14, 1972, Order is in direct conflict with the laws of Michigan. In particular, the District Court ordered the following:

1. "Pupil reassignment to accomplish desegregation of the Detroit Public Schools is required within . . . the 'desegregation area' . . . "[3]

Yet, under the laws of Michigan, the assignment of pupils is reserved to each school district. State law provides:

"In districts where provision is made for kindergarten work, all children, residents of the district, shall be entitled to enroll in the kindergarten . . ." (CL '48, §340.357; M.S.A. §15.3357)

"All persons, residents of a school district not maintaining a kindergarten, and at least 5 years of age on the first day of enrollment of the school year, shall have an equal right to attend school therein." (CL '48, §340.356; M.S.A. §15.3356)

"Every board shall establish and carry on such grades, schools and departments as it shall deem necessary or desirable for the maintenance and improvement of the schools; determine the courses of study to be pursued and cause the pupils attending school in such district to be taught in such schools or departments as it may deem expedient: Provided, That a primary district shall not operate any grades above the eighth." (CL '48, §340.583; M.S.A. §15.3583.)

2. "Appropriate and safe transportation arrangements shall be made available without cost to all pupils . . ."[4]

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[3] Reference, Exhibit "B": ¶ II. A., Page 5.

[4] Reference, Exhibit "B", ¶ II. C., Page 6.

The transportation of resident and non-resident pupils is reserved to the school districts. State law provides:

> "Every board shall have authority to make reasonable rules and regulations relative to anything whatever necessary for the proper establishment, maintenance, management and carrying on of the public schools of such district, including regulations relative to the conduct of pupils concerning their safety while in attendance at school or enroute to and from school." (CL '48, § 340.614; M.S.A. § 15.3615)
>
> "The board of any school district may enter into a contract with any other district or with private individuals to furnish transportation for nonresident pupils attending public [and state approved nonpublic] schools located within such district or in other districts. . . ." (CL '48, § 340.591; M.S.A. § 15.3591)
>
> "When nonresident pupils, their parents or guardians, pay school taxes in said district and such pupils are admitted to schools in the district, the amount of such total current school taxes shall be credited on their tuition and transportation in a sum not to exceed the amount of such tuition and transportation for only the difference therein." (CL '48, § 340.359; M.S.A. § 15.3359)
>
> 3. "At each school within the desegregated area provision shall be made to insure that the curriculum, activities, and conduct standards respect the diversity of students from differing ethnic backgrounds and the dignity and safety of each individual, students, faculty, staff and parents."[5]

Control of the educational program is a power reserved to the school districts. State law provides:

> "The board of any school district of the third class hereunder shall have the powers and duties:
>
> (a) To establish and carry on such grades, schools and departments or courses of study as it shall deem necessary or desirable for the maintenance and improvement of public education;" (CL '48, § 340.114; M.S.A. § 15.3114)

---

[5] Reference, Exhibit "B", ¶ II. K., Page 9.

4. "Pending further orders of the Court, existing school district and regional boundaries and school governance arrangements will be maintained and confirmed, except to the extent necessary to effect pupil and faculty desegregation as set forth herein . . ."[6]

The implementation of the consolidation and annexation of school districts is reserved to the school districts and its residents. State law provides:

> "Any school district shall become annexed to another school district whenever the board of the annexing district shall have by resolution so determined and a majority of the qualified school electors of the district becoming annexed, voting on the question at an annual or special election, shall have approved such annexation. . ." (CL '48, §340.431; M.S.A. §15.3431.)
>
> "The question of establishing a consolidated school district shall be submitted to the school electors at a special election held for such purpose . . ." (CL '48, §340.407; M.S.A. 15.3407.)

5. "Faculty and staff shall be reassigned, in keeping with pupil desegregation . . ."[7]

The authority to hire and contract with teachers and staff employees is reserved to each school district. State law provides:

> "The board of every district shall hire and contract with such duly qualified teachers as may be required. All contracts with teachers shall be in writing and signed by a majority of the board in behalf of the district, or by the president and secretary, or by the superintendent of schools [or his designee] when so directed at a meeting of the board . . ." (CL '48, §340.569; M.S.A. §15.3569)

IV. REASONS WHY WRIT SHOULD ISSUE

A. THE DISTRICT COURT'S ORDER OF JUNE 14, 1972, IS IN CONTRAVENTION OF THE FEDERAL RULES

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6 Reference, Exhibit "B", ¶ II. J., Page 8.

7 Reference, Exhibit "B", ¶ II. F., Page 7.

OF CIVIL PROCEDURE, TITLE 28, U.S.C. AND PROCEDURAL DUE PROCESS.

1. The Birmingham School District Was (And Is) An Indispensable Party To The Proceedings In The District Court.

a. The laws of the State of Michigan determine which parties are to be deemed indispensable.

The Rule is well settled that a Federal District Court must have in personam jurisdiction over all indispensable parties to the litigation and that no District Court should proceed to a final decision without them. *Shields* v. *Barrow*, 17 How. 129, 15 L.Ed. 158 (1854); *Atwood* v. *National Bank of Lima*, 115 F.2d 861 (6th Cir., 1940); *Baker* v. *Dale*, 123 F. Supp. 364, (W.D.Mo., 1954); Rule 19, Federal Rules of Civil Procedure, Title 28, U.S.C.

Indispensable parties are:

> "Persons who not only have an interest in the controversy, but an interest of such nature *that a final decree cannot be made without either affecting that interest*, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (emphasis added)

Shields v. *Barrow*, 17 How. 129, 139, 15 L.Ed. 158 (1854), cited with approval in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U.S. 33, 48, 30 S.Ct. 10, 54 L.Ed. 80 (1909), and *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 80, 41 S.Ct. 39 (1920). See also *Trans-Pacific Corp.* v. *South Seas Enterprises, Ltd.*, 291 F.2d 435 (9th Cir., 1961), *Grace* v. *Carroll*, 219 F. Supp. 270, (S.D.N.Y., 1963), *3 Moore, Federal Practice*, 2150 (2d ed., 1948).

In determining whether a party is indispensable, the Court must initially determine the nature and extent of the party's interests. Here again, the rule is well-settled: The rights and interests of parties are to be determined under the state's substantive law.

> *"After those rights and interests have been ascertained by state law*, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded. *This will depend, of course, on the substantive rights created*

by the state." (emphasis added)

Hertz v. *Record Publishing Company of Erie*, 219 F.2d 397,400, (3rd Cir., 1955), cert. denied 349 U.S. 912, 75 S.Ct. 601, 99 L.Ed. 1247 (1955). *Jet* v. *Zink*, 362 F.2d 723, (5th Cir., 1966); *Baker* v. *Dale*, 123 F. Supp. 364, (W.D. Mo., 1954), (applying Rule 19 of Federal Rules of Civil Procedure, Title 28, U.S.C.). See also *3 Moore, Federal Practice*, §19.07; *Grace* v. *Carroll*, 219 F. Supp. 270, 272 (S.D.N.Y., 1963); *Richmond Lace Works, Inc.* v. *Epstein*, 31 F.R.D. 150 (S.D.N.Y., 1962); *Dunham* v. *Robertson*, 198 F.2d 316 (10th Cir., 1952); *Cf. Korese* v. *General Steel Castings Corp.*, 179 F.2d 760 n.1, 15 ALR2d 1117 (3rd Cir., 1950); *Brainiff Airways* v. *Falkinham*, 20 F.R.D. 141 (D. Minn., 1957).

The above rules have been consistently applied in the particular context of those civil rights actions commenced under federal law. In *Jeffers* v. *Whitley*, 165 F.Supp. 951 (N.D.N.C., 1958), Plaintiffs alleged, *inter alia*, that the schools operated within a county-wide school district:

> ". . . are being operated on a segregated basis, pursuant to the direction and authority of the State Constitution, State Statutes, and State administrative orders and legislative policy." 165 F.Supp. at 952

Plaintiffs sued the County Superintendent of Public Schools and the County School Board as well as the State Superintendent of Instruction and the individual members of the State Board of Education. The Court dismissed the action as to the state officials:

> "In passing on the question of whether or not the State Board of Education and the State Superintendent of Public Instruction (hereinafter referred to as the 'State Officials') are indispensable and necessary parties to this action, we must look to the allegations of the original complaint and the proposed supplemental complaint, including the nature of relief sought, and the *public school laws of the State of North Carolina, of which we must take judicial notice, to determine if any decree granting the relief sought will require the state officials to take action by exercising any power lodged in them*, . . ." (emphasis added) (165 F.Supp. at 955)

Also see *McKissick* v. *Durham City Board of Education*, 176 F.Supp. 3, (M.D.N.C., 1959); *Covington* v. *Edwards*, 264 F.2d 780 (4th Cir., 1959); *Thaxton* v. *Vaughn*, 321 F.2d 474 (4th Cir., 1963).

In the very specific context of those civil rights actions commenced under federal law, which involve the possibility of the transfer of students from one school district to another, the same rule has been applied: State law determines the indispensability of the school districts. *Bradley* v. *School Board of Richmond, Virginia*, 51 F.R.D. 139, 143 (E.D.Va., 1970).

It is thus submitted that state law must be consulted in determining whether the Birmingham School District was (and is) an indispensable party to *Bradley, et al.* v. *Milliken, et al.*

b. Under the laws of the State of Michigan, the Birmingham School District is vested with such rights, authorities, and interests that it is an indispensable party to the proceedings in the District Court.

The Birmingham School District is vested, by state law with, *inter alia*, the following exclusive rights, powers, and interests:[8]

A. Hiring of teachers and staff. (M.C.L.A. 340.569; M.S.A. §15.3569)

B. Acquisition of transportation. (M.C.L.A. 340.594; M.S.A. §15.3594)

C. Control of attendance of non-resident students. (M.C.L.A. 340.582, M.S.A. §15.3582)

D. Determination of appropriate curriculum. (M.C.L.A. 340.583, M.S.A. §3583; M.C.L.A. 340.114, M.S.A. §15.3114)

E. Levy of authorized millage. (M.C.L.A. 340.643(a), M.S.A. §15.3643(1); M.C.L.A. 340.614, M.S.A. §15.3615)

F. Transportation of non-resident students. (M.C.L.A.

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[8] There is an irreconcilable conflict between the Birmingham School District's statutory authority and the terms of the District Court's Order of June 14, 1972. See pp. 5-9, *supra*.

340.591, M.S.A. §15.3591; M.C.L.A. 340.359, M.S.A. §15.3359)

G. Consolidation and annexation of school districts. (M.C.L.A. 340.431, M.S.A. §15.3431; M.C.L.A. 340.407, M.S.A. §15.3407)

In addition, the laws of the State of Michigan clearly provide that School Districts are public corporate bodies empowered to sue and be sued, acquire, hold, and convey real and personal property and exercise general plenary power over the educational system within its boundaries. M.C.L.A. §340.352; M.S.A. §15.3352; *Marathon School District No. 4* v. *Gage*, 39 M. 484 (1878); *King* v. *School District No. 5*, 261 M. 604 (1933); *Public Schools of Battle Creek* v. *Kennedy*, 245 M. 585.

It is specifically noted at this juncture that the State Board of Education is charged by the Michigan Constitution with the:

> "leadership and general supervision over all public education . . . [and is to serve as] the general planning and coordinating body for all public education . . ." Michigan Constitution, Article VII, §3, (1963)

But as the foregoing recitation of the Birmingham School District's specific statutory powers demonstrates, there is a clear dichotomy between the general supervisory authority vested in the State Board of Education and the Acting Superintendent of Public Instruction, and the specific and detailed authority vested in the school districts. Michigan Statutes clearly vest *exclusive* authority in these specific and detailed administrative matters in the school districts. It is also clear that the State Board of Education and its agents, the Acting Superintendent of Public Instruction, have no right or authority under state law to divest the Birmingham School District of its clear and specific statutory powers.

The distinctions drawn, and the limitations imposed, by state law in this regard must be observed by the District Court, which, it is submitted, was (and is) not free to disregard or re-interpret state law in a manner which ascribes greater or lesser interests to the various potential parties in this litigation.

It is thus well-settled that state law determines the repository of the specific powers and interests at issue, and in analogous situ-

ations it has been uniformly held that the indispensable party is the state agency or subdivision which has the specific authority to make pupil assignments and exercise other specific powers necessary to effectuate the dictates of a remedial order.

In *Jeffers* v. *Whitley*, 165 F. Supp. 951, (M.D.N.C., 1958), (discussed at pp. 11-12, *supra.*) for example, the Court dismissed the action as to the State Superintendent of Instruction and the members of the State Board of Education and observed:

> "While the state officials are given broad general powers over the public school system, specific authority for the assignment and enrollment of pupils in all city and county administrative units throughout the state is vested solely in county and city boards of education." 165 F.Supp. at 955

In *Covington* v. *Edwards*, 264 F.2d 780, (4th Cir., 1959), the Plaintiffs sued the local Superintendent of Schools and the County Board of Education to secure an Injunction directing Defendants to develop a plan of desegregation and to cease pupil assignment on the basis of race. On an Appeal involving, *inter alia*, a claim that the District Court erroneously denied Plaintiff's Motion to join the State Board of Education and the State Superintendent of Public Instruction as parties defendant, the Court of Appeals ruled:

> "It is pointed out that the State Board has general control of the supervision and administration of the fiscal affairs of the public schools and other important powers conferred by the General Statutes, sec. 115-4, 115-11 and 115-283. The provisions of sec. 115-178 of the Pupil Placement Act, however, places the authority in the County Boards of Education to make the assignments and enrollment of pupils and contains no direction for the participation of the State Board of Education in these matters. We therefore think that nothing would be gained by joining these officials as additional defendants and that the judge was correct in denying the motion to amend the complaint." 264 F.2d at 780

And, in *Thaxton* v. *Vaughan*, 312 F.2d 474 (4th Cir., 1963), Plaintiffs sought to eliminate the segregation of the races in the use of a municipally owned armory. The District Court dismissed

the action because insufficient defendants were before the Court to make its order effective. In its affirmance, the Court of Appeals noted that the City Manager had the immediate control over the use of the armory, subject to the ultimate control by the City Council. The only defendant before the Court was the City Mayor, who the Court noted:

> "is merely the member of the Council chosen by the Councilmen to chair their meetings . . . He does not, acting alone, have the authority either to make or enforce policy decisions of the Council." 321 F.2d at 477.

Finally, in the specific context of those civil rights actions commenced under federal law, which involved the possibility of the transfer of students from one school district to another, the well-settled rules set forth above have been carefully observed.

In *Bradley* v. *School Board of City of Richmond, Virginia*, 51 F.R.D. 139, (E.D.Va., 1970), the District Court in granting the Defendant City School Board's motion to join the members of the School Boards and Boards of Supervisors of adjoining school districts, ruled:

> "In the possible event that a consolidated school system be found an appropriate and required form of relief from state-imposed segregation, *it is clear that the participation of the school boards and governing units of the divisions sought to be consolidated would be required in order to institute a completely unitary system.* County school boards have broad powers and duties, Va. Code §22-72 (1969 Repl. Vol.), and the governing units may be necessary parties for the same reasons that impelled this Court to order the joinder of the members of the City Council of the City of Richmond." (emphasis added) 51 F.R.D. at 143

The Petitioner, Birmingham School District, is unaware of any case involving possible cross-district bussing in which all school districts possibly affected (i.e. by having its rights and liabilities adjudicated or by being made subject to a remedial order) were not originally, or upon special motion, made a party to the litigation. Yet, neither the Plaintiffs in *Bradley, et al.* v. *Milliken, et al.*, nor the District Court, has ever recited any authority for the

complete disregard of the well-settled jurisdictional rules set forth above, which have been uniformly applied in analogous cases.[9]

It is respectfully submitted that only the Birmingham School District has the specific statutory authority to make pupil assignments and exercise the other specific powers necessary to effectuate the District Court's Order of June 14, 1972. It is further submitted that the broad powers and interests vested by state law in the Birmingham School District were affected by the District Court's June 14, 1972, Order in such a severe and substantial manner (See pp. 5-9, *supra.*) that it was an indispensable party to the proceedings. Finally, it is submitted that the Birmingham School District is an indispensable party to any further proceeding in which its rights and interests, as defined by state law, might be modified.

2. *The District Court Does Not Have, And Never Has Had, In Personam Jurisdiction Over The Birmingham School District.*

It is undisputed that the Birmingham School District is not, and never has been, a party to *Bradley, et al.* v. *Milliken, et al.*[10]

The District Court has apparently assumed that jurisdiction over the present defendants confers jurisdiction over the local school districts bound by the June 14, 1972 Order.[11] This is patently erroneous.

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[9] Specifically, *Bradley* v. *School Board of Richmond, Virginia*, 51 F.R.D. 139 (E.D.Va., 1970); *Higgins, et al.* v. *Michigan State Board of Education, et al.*, (W.D. Mich., Docket No. 6386) and *United States, et al.* v. *Board of School Commissioners of the City of Indianapolis, et al.*, (S.D. Ind., Docket No. IP-68-C-225).

[10] A motion was filed by Intervening Defendants, Denise Magdowski, et al., on July 12, 1971, to join *all* school districts (including Petitioner) in the Three (3) county area; Respondent refused to act upon the Motion, and on June 14, 1972, when Respondent issued his *Ruling on Desegregation Area*, the motion was withdrawn.

[11] The Complaint recites that the State Board of Education

"is generally charged with the power and responsibility of administering the public school system in the State of Michigan."

(See Ex. "A", Paragraph IV. 3.) The Order of June 14, 1972 speaks to the Superintendent of Public Instruction (see Ex. "B")

The State of Michigan is *not* a party to this litigation. Of the current state defendants[12], only the State Board of Education and the Acting Superintendent of Public Instruction have any constitutional or statutory authority in regard to the specific and detailed administration of the state educational system. But as has been demonstrated, Michigan law[13] clearly indicates: That the State Board of Education and the Acting Superintendent of Pubic Instruction have powers wholly separate and distinct from those vested in School Districts; that while the State Board of Education is given the responsibility of general supervision and leadership, the school district alone is given the plenary power to operate the school system; that the State Board of Education and the Acting Superintendent of Public Instruction are, under state law, without authority to direct the School District to waive or modify its rights, duties, and powers under state law. In sum, the State Board of Education and the Acting Superintendent of Public Instruction are not the *alter ego* of the Fifty-Three (53) school districts sought to be bound by the Court's June 14, 1972, Order and, under state law, jurisdiction over the current state defendants does not confer jurisdiction over the Birmingham School District.

It is therefore submitted that jurisdiction over the State Board of Education is not the same as, nor may it stand in the place of, jurisdiction over the Birmingham School District. While it is apparent that the District Court's June 14, 1972 Order envisions a massive alteration of the Detroit Metropolitan Area's educational system and that it would be judically convenient to disregard the well-settled jurisdictional rules set forth above, neither the Plaintiffs, nor the District Court, has ever recited any authority for such a judicial shortcut.

The State Board of Education and the Acting Superintendent of Public Instruction simply do not possess the constitutional or statutory authority to implement the June 14, 1972, Order, nor do they possess the authority to revise the statutory distribution

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12 The current state-defendants are: The Governor, the Attorney General, the Treasurer, the State Board of Education, and the Acting Superintendent of Public Instruction. See Exhibit "A". The State Treasurer was joined by Motion at the July 10, 1972 Hearing.

13 See pp. 5-9, 12-14, *supra*.

of powers or to require the Birmingham School District to disregard its enabling legislation.

In point of fact, in regard to the June 14, 1972, Order, the District Court simply does not have the correct parties before it.

3. The District Court's Order Of June 14, 1972 Directed To The Birmingham School District, Was In Contravention Of The Federal Rules of Civil Procedure, Title 28, U.S.C. and Procedural Due Process.

As demonstrated *supra*, the Birmingham School District is an indispensable party to any proceeding in which its interests, vested by state law, might be modified. As also demonstrated *supra*, the Birmingham School District was (and is) not a party to the proceedings which culminated in the Order of June 14, 1972.

The Birmingham School District submits therefore that the June 14, 1972 Order was issued in contravention of the Federal Rules of Civil Procedure 4(b) (b) and 19(b), 28 U.S.C.A. and of the Birmingham School District's right to procedural due process.

It is further submitted that the continued application of the Order is in contravention of Federal Rules of Civil Procedure 65(d) because the Order binds a party over which the Court does not have jurisdiction. The rule is well-settled that Rule 65(d) fixes the scope of valid orders; terms in a decree exceeding the rule are of no effect. *Swetland* v. *Curry*, 188 F.2 841 (6th Cir., 1951); *Alemite Mfg. Co.* v. *Staff*, 42 F.2 834 (2d Cir., 1930); *Baltz* v. *The Fair*, 178 F. Supp. 691 (N.D. Ill., 1959); *Chisolm* v. *Caines*, 147 F.Supp. 188 (E.D.S.C., 1954).

In *Bell* v. *School Board of Powhatan County, Va.*, 321 F.2d 494, (4th Cir., 1963), the District Court's Order enjoining the School Board from closing the district's schools was challenged on appeal. The School Board argued that under state law, it did not have the power to appropriate funds for the operation of the schools (this authority being vested by state law in the Board of County Supervisors), and therefore could not assure that the schools would remain open. The Court ruled:

"The answer is that in respect to the Board of County Supervisors we agree: Since it is not a party its duty should not be

adjudicated here and we do not find it necessary to deal with the Board of Supervisors in this appeal." (footnote omitted) 321 F.2d at 489

And in *Thaxton* v. *Vaughn*, 321 F.2d 474 (4th Cir., 1963), (discussed *supra*. at pp. 16-17), the Court affirmed the dismissal of the action against the City Mayor because:

"The relief requested by the Plaintiffs could not possibly be granted effectively in the absence of either the City or the Council, or other appropriate defendants, and a court, particularly in an equity action, ought not grant relief against a public official unless its order will be effective. Cf. *Gnerich* v. *Rutter*, 265 U.S. 388, 44 S.Ct. 532, 68 L.Ed., 1068 (1924); *Webster* v. *Fall*, 266 U.S. 507, 45 S.Ct. 148, 69 L.Ed. 411 (1925); *Williams* v. *Fanning*, 332 U.S. 490, 68 S.Ct. 188, 92 L.Ed. 95 (1947); *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603-604, 77 S.Ct. 545, 1 L.Ed.2d 583 (1957); Cf. *28 Am. Jur., Injunctions*, Sec. 37,362." 321 F.2d at 478

B. IN THE PRESENT CIRCUMSTANCES, THE ISSUANCE OF THE WRIT OF MANDAMUS AND/OR PROHIBITION IS APPROPRIATE.

Not until July 20, 1972, when the District Court ordered the entry of judgments in accordance with the provisions of Federal Rules of Civil Procedure 56(b), 28 U.S.C.A. (see Exhibit "C", ¶4), was your Petitioner, the Birmingham School District, made subject to a final judgment and order. The June 14, 1972, Order, as a final judgment, is a final ruling *inter alia* that the Birmingham School District may be validly ordered to relinquish its specific statutory powers and validly ordered to participate in a cross-district bussing plan regardless of the fact that it has at no time been a party to the proceedings. It is submitted that the District Court has thus made a final ruling that well-settled jurisdictional principles may, and will, be disregarded in *Bradley, et al.* v. *Milliken, et al.*

The Birmingham School District submits that District Court has exceeded the lawful exercise of its prescribed jurisdiction and seeks the Writs traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943) at 26. The totally unknown

effects which massive tri-county bussing may have upon the education and safety of the school children involved in the June 14, 1972, Order, as well as the indeterminable cost in time and dollars of the Order's implementation, make this a matter of "public importance" and thus a "case appropriate for the extraordinary writs." *Morrow* v. *District of Columbia*, 417 F.2d 728 (C.A.D.C., 1969), at 736, 737.

The extraordinary writs are the only viable remedy open to Petitioner. Because it is not a party, Petitioner may not appeal Respondent's June 14, 1972 Ruling and Order. [14] Attempted intervention in the proceedings at this time, even if successful, would provide no relief, since the District Court has already proceeded to a final judgment that the Birmingham School District is to be included in the "desegregation area." The Birmingham School District should not be deprived of its rights, under the rules of procedural due process, to a fair hearing in this matter.

The only other alternative by which the Birmingham School District could test the validity of the June 14, 1972, Order, would be a refusal to obey the Orders of the Court, which refusal would engender the possibility of contempt of court proceedings.

In view of the fact: (1) That the District Court has disregarded the well-settled rules of jurisdiction, the Federal Rules of Civil Procedure, and the rules of procedural due process; (2) That the District Court has not relied upon, and does not in fact have, any surpporting authority for the application of the June 14, 1972, Order to a non-party; (3) That the application of the June 14, 1972, Order to the Birmingham School District has and will continue to cause irreparable injury to its rights and interests; (4) That the Birmingham School District does not have any other viable remedy; the issuance of the Writ of Mandamus and/or Prohibition is appropriate.

V. RELIEF REQUESTED

Your Petitioner respectfully prays that a Writ of Prohibition and/or Mandamus issue out of this Court directed to a the Honora-

[14] Although a Motion was before Respondent from July, 1971, to June, 1972, to join Petitioner and Eighty-Five (85) other school districts as party defendants, Respondent refused to act upon it.

ble Stephen J. Roth, District Judge, for the Eastern District of Michigan, Southern Division, as follows:

A. That said Writ require and direct the entry of an Order by said District Judge that said Order of June 14, 1972, identified in Sub-Paragraph B, be quashed as to this Petitioner, and,

B. That said Writ prohibit the Honorable Stephen J. Roth, or any persons acting for or on behalf of said District Judge, from enforcing or implementing or in any manner proceeding under the ruling and Order for establishment of desegregation area dated June 14, 1972, in the case of *Bradley, et al.* v. *Milliken, et al.*, Civil Action Number 35257 in the United States District Court for the Eastern District of Michigan, Southern Division, as to this Petitioner, and,

C. That said Writ prohibit the Honorable Stephen J. Roth from in any manner entering any ruling or Order which affects the rights and interests, as defined by State Law, of the Petitioner until the District Court has acquired jurisdiction over the Petitioner and has accorded the Petitioner a full Hearing in this matter; and

D. That said Writ or Prohibition or alternately Writ of Mandamus prayed for herein be issued as an emergency Writ and be directed to said District Judge forthwith for compliance with the terms hereof; and,

E. That for the reasons and grounds stated herein, this matter be set for immediate Hearing before the Honorable Court; and,

F. That your petitioner have such further and different relief as may be required and be deemed just and equitable under the circumstances set forth herein.

Respectfully submitted,

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By: /s/ Charles E. Keller
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(313) 965-7610

Dated: July 27, 1972
Detroit, Michigan

APPENDIX D

NO. 72-1771
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN **Petitioner** **v.** **THE HONORABLE STEPEHN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION** **Respondent**	**ORDER**

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK Circuit Judges.

Upon consideration, IT IS ORDERED that the application for writ of mandamus and prohibition is denied and the petition is dismissed.

This order is entered without prejudice to the right of the petitioner School District to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX E

UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN, Petitioner, vs. THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, Respondent.	Case No. 72-1771

PETITION FOR REHEARING OF PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

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UNITED STATES OF AMERICA
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN, **Petitioner,** **-vs-** **THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION** **Respondent.**	**Case No. 72-1771**

PETITION FOR REHEARING OF PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

TO: THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES the School District of the City of Birmingham, Oakland County, Michigan, (hereinafter referred to as the Birmingham School District), by its attorneys, Keller, Thoma, McManus, Toppin & Schwarze, and in this Petition For A Rehearing Of The Petition For Writ Of Prohibition And/Or Mandamus does say:

1. On August 4, 1972, by Certified Mail, the Petitioning School District filed a Petition For Writ of Prohibition in the above-entitled matter, and Proof of Service with respect thereto in this cause.

2. On August 7, 1972, this Court entered its Order denying said Petition without prejudice to the right to intervene in the case of *Ronald Bradley, et al.* v. *William Milliken, et al.*, being Civil Action No. 35257 in the United States District Court for the Eastern District of Michigan, Southern Division.

3. That Petitioner, Birmingham School District, has raised questions in the original Petition For Writ Of Prohibition And/Or Mandamus which are related to, but district from, those raised by

suburban school districts which intervened in said litigation. Petitioner should have the opportunity for a Hearing before this Court with respect to the serious and basic jurisdictional issues raised in said Petition.

4. That Petitioner shows that for all practical purposes the litigation in the Trial Court has been concluded. Intervention in said cause in its present posture and in view of the restrictions imposed upon the intervening suburban school districts by the Trial Court by its Order of March 15, 1972, would therefore be a meaningless gesture.

WHEREFORE, Petitioner prays:

A. That a rehearing of the Petition For Writ Of Prohibition And/Or Mandamus heretofore filed by Birmingham School District be granted; and,

B. That said Petition be set for Hearing on such date as may be convenient to the Court, if deemed appropriate by this Honorable Court; and,

C. That the Writ issue as prayed for in said Petition for Writ of Prohibition and/or Mandamus heretofore filed in this case.

Respectfully submitted,

KELLER, THOMA, McMANUS,
TOPPIN & SCHWARZE

By: /s/ Charles E. Keller
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Dated: August 21, 1972
Detroit, Michigan

APPENDIX F

No. 72-1771
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN,

Petitioner,

v. ORDER

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,

Respondent.

Before PHILLIPS, Chief Judge and EDWARDS and PECK, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ James A. Higgins,
Clerk

IN THE

Supreme Court of the United States

October Term, 1972

Supreme Court, U. S.
FILED
JAN 30 1973
MICHAEL RODAK, JR., CLERK

No. 72-747

BLOOMFIELD HILLS SCHOOL DISTRICT,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH.

No. 72-748

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND COUNTY, MICHIGAN, *et al.*,
Petitioners,

vs.

THE HONORABLE STEPHEN J. ROTH.

No. 72-817

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH.

MEMORANDUM IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-747

BLOOMFIELD HILLS SCHOOL DISTRICT,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH.

No. 72-748

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vs.

THE HONORABLE STEPHEN J. ROTH.

No. 72-817

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM, OAKLAND COUNTY, MICHIGAN,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH.

MEMORANDUM IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

These Petitions for Writs of Certiorari are collateral to the lawsuit commenced in 1970 to desegregate the public

schools of the Detroit, Michigan area, *Bradley* v. *Milliken*. That matter was last before this Court this past Term on the Petition of the State officials who are defendants in the case seeking review (which was denied) of the dismissal of an interlocutory appeal by the Sixth Circuit. 468 F.2d 902, *cert. denied*, 93 S.Ct. 45 (1972).

Petitioners are all corporate entities, school districts which were created by and function pursuant to the authority of the State of Michigan, and each of which is located within Oakland County, Michigan—the county which abuts the City of Detroit to its northwest. Each of the Petitioners elected in early 1972 not to intervene before the District Court, at the time when some 40 similarly situated school districts sought and were granted the right to intervene in the *Bradley* v. *Milliken* proceedings since the District Court was considering possible forms of relief which might affect them as agents of the State of Michigan for educational purposes. Each of the Petitioners instead waited until after the District Court issued an order, defining the area surrounding and including the City of Detroit within which a desegregation plan was to be developed, and then Petitioners sought Writs of Prohibition or Mandamus from the Court of Appeals to halt proceedings in the District Court. In each instance, the Petitions for Mandamus or Prohibition were denied without prejudice to their right to seek intervention in the District Court.

Even then Petitioners did not avail themselves of the opportunity either to enter the case at the District Court level or to intervene in the Court of Appeals, which considered the merits of the District Court's order defining a "desegregation area" in an appeal argued August 24, 1972 pursuant to an Order expediting proceedings. Instead, each of the Petitioners sought rehearing or rehearing

en banc of the orders denying the extraordinary writs, and then filed with this Court the Petitions for review which are presently under consideration.

Since the filing of the Petitions, the Court of Appeals issued a ruling on December 8, 1972 in which it vacated the District Court's order defining a desegregation area and remanded for additional remedy hearings, holding that school districts (such as Petitioners), who would be affected by such a desegregation order, are necessary parties to proceedings in the District Court prior to the entry of such an order.* On January 16, 1973, however, the Court of Appeals issued an Order setting the matter down for rehearing *en banc* on February 8, 1973, with the effect of vacating the opinion of the panel.**

The Petitioners raise three basic issues, each of which is intimately bound up with the proceedings in the main appeals now pending before the United States Court of Appeals for the Sixth Circuit upon rehearing *en banc,* and each of which ought not be considered by this Court prior to disposition by the full Court of Appeals.

Petitioners claim, first, that the District Court should not have proceeded to enter a decree which affects the operation of their schools if they were not parties to the proceedings before the Court. Putting to one side the facts that Petitioners chose not to avail themselves of the opportunity for intervention which was seized by many of their sister districts and that Petitioners are each subsidiary agents of the State of Michigan (which *was* represented before the District Court), the claim is an in-

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* The December 8, 1972 opinion of the panel was reprinted as an appendix to the "Supplemental Brief in Support of Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit" in Nos. 72-549, 72-550.

** Rule 3(b), United States Court of Appeals for the Sixth Circuit.

appropriate one for review at this juncture. The panel of the Court of Appeals ruled on December 8, 1972—even though Petitioners disdained to participate in the appeals before the Court—that Petitioners were indeed necessary parties before the District Court. It is entirely possible that the full Court upon rehearing will reaffirm this element of the decision since, so far as these Respondents are presently aware, none of the parties opposes the participation of Petitioners in the remand hearings before the District Court which had been ordered by the panel. Thus, should that ruling be upheld *en banc,* the question whether the Petitions for Mandamus or Prohibition were properly denied will be rendered moot.*

Petitioners also complain that the District Court acted improperly when it determined to include their school districts in the "desegregation area" without specific findings that Petitioners had engaged in *"de jure"* segregation practices. This matter is one which perhaps might be viewed as lending support to Petitioners' claims that mandamus or prohibition should have issued, but it is intimately concerned in the present proceedings before the Court of Appeals and ought not to be reviewed at this stage. The panel's opinion at page 68 held:

> In fashioning an equitable remedy in this case, it will not be necessary for the District Court to find discriminatory conduct on the part of each school district, either de jure or de facto, as a prerequisite to including such district in a desegregation area to be defined by the Court's decree.

We are, of course, unable to predict whether this language will be adopted, modified, or rejected by the full Court, but certainly this Court's consideration of so important

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* Of course, should the panel's opinion be reversed by the full Court on the question of metropolitan desegregation relief, these Petitions will also thereby be mooted.

an issue will be materially aided by its intervening litigation before the Court of Appeals. *Cf. Brown Shoe Company* v. *United States*, 370 U.S. 294, 355 (Clark J., concurring).

Finally, two of Petitioners argue that the order of the District Court defining a desegregation area was one which could have been issued only by a statutory three judge court pursuant to 28 U.S.C. § 2281. This issue is likewise before the Court of Appeals in its consideration of the main case, and this Court would be better served by denying review of these Petitions and postponing its consideration for a later stage following the ruling of the entire Court of Appeals for the Sixth Circuit.

For these reasons, Respondents Bradley, et al., respectfully submit that the Petitions are premature, constitute attempts to secure piecemeal review, and should be denied so as to afford the Court of Appeals an opportunity to rule upon the substantive questions common both to these Petitions and to the matters now pending before it upon rehearing *en banc*.

Respectfully submitted,

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Attorneys for Respondents
Ronald Bradley, et al.,
Plaintiffs Below

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. .....

BLOOMFIELD HILLS SCHOOL DISTRICT,
Petitioner,

vs.

STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE,
EASTERN DISTRICT OF MICHIGAN,
Respondent.

and

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM,
OAKLAND COUNTY, MICHIGAN,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,
Respondent.

and

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND
COUNTY MICHIGAN and CLARENCEVILLE SCHOOL
DISTRICT OF OAKLAND AND WAYNE COUNTY,
MICHIGAN,
Petitioners,

vs.

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Board of Education of the School District of the City of Detroit, a Michigan School District of the

first class (hereinafter referred to as "Detroit Board of Education"), a party to the principal litigation herein, *Bradley* v. *Milliken*, No. 35257 (ED Mich), respectfully submits this its Supplemental Brief in Opposition to the Petitions for Writs of Certiorari filed herein by Petitioners Bloomfield Hills School District, West Bloomfield School District of Oakland County, Michigan and Clarenceville School District of Oakland and Wayne Counties, Michigan, and School District of the City of Birmingham, Oakland County, Michigan.

OPINIONS BELOW

1. *Appellate:*

a. *Bradley* v. *Milliken*, 433 F2d 897 (CA6 1970).

b. *Bradley* v. *Milliken*, 438 F2d 897 (CA6 1971).

c. *Bradley* v. *Milliken*, ... F2d ..... (CA6 1972), cert denied ..... US ....., 41 USLW 3175 (Oct. 10, 1972).

d. *Bradley* v. *Milliken*, ... F2d ..... (CA6 November 27, 1972).

e. *Bradley* v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), Petition for rehearing *en banc* granted, ... F2d ..... (CA6 January 16, 1973).

f. *Bloomfield Hills School District* v. *Roth*, ... F2d ..... (CA6 July 17, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

g. *West Bloomfield School District, et al* v. *Roth*, ... F2d ..... (CA6 July 17, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

h. *School District of the City of Birmingham* v. *Roth*, ... F2d ..... (CA6 August 7, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

2. *District Court:*

a. *Bradley* v. *Milliken*, 338 F Supp 582 (ED Mich 1971) (ruling on segregation).

b. *Bradley* v. *Milliken*, ... F Supp ..... (ED Mich March 28, 1972) (ruling on intra-city plans of desegregation).

c. *Bradley* v. *Milliken*, ... F Supp ..... (ED Mich March 24, 1972) (ruling on propriety of metropolitan plans for desegregation).

d. *Bradley* v. *Milliken*, 345 F Supp 914 (ED Mich 1972) (ruling on desegregation area and development of plan.)

JURISDICTION

For the reasons discussed below, Respondent Detroit Board of Education suggests that the jurisdiction of the Court of Appeals below was improperly invoked in these cases under 28 USC §1651, and consequently the jurisdiction of this Court is improperly invoked by 28 USC §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These cases involve the All Writs Statute, 28 USC §1651 (a):

> "The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law."

QUESTIONS PRESENTED FOR REVIEW

I. Do Petitioners lack standing to apply to the Court of Appeals for Writs of Mandamus and/or Prohibition to limit the jurisdiction of a district court in a case to which Petitioners, by their own inaction, were not parties?

II. Are the Petitions for Writs of Certiorari non-justiciable on the grounds of mootness and/or prematurity, where the Court of Appeals, in its decision on the merits of the principal case herein involved, may substantially grant the relief requested by Petitioners?

STATEMENT OF THE CASE

Respondent Detroit Board of Education accepts as substantially correct the Statement of the Case presented by Petitioners in the various Petitions.

Respondent Detroit Board of Education would emphasize, however, one point made by each Petitioner: None of the various Petitioners herein have been parties to this litigation due to the fact that they declined to intervene as party-defendants, unlike numerous other suburban school districts, in the principal case of *Bradley* v. *Milliken*, No 35257 (ED Mich).[1]

Respondent Detroit Board of Education would further advise this Honorable Court that on December 8, 1972, the Court of Appeals for the Sixth Circuit issued its decision on the merits in *Bradley* v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), vacated for hearing *en banc*, ... F2d ..... (CA6 January 14, 1973). In so ruling, the Court of Appeals stated:

> "We hold that school districts which are to be affected by the decree of the District Court are 'necessary parties' under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be a party to this litigation and afforded an opportunity to be heard."

Bradley v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), slip opinion at 68.

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[1] In each case, the Court of Appeals, in denying the requested writs, stated:

"This order is entered without prejudice to the right of the petitioner School Districts to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan."

ARGUMENT

I. INTRODUCTION

On November 24, 1972, Petitioner Bloomfield Hills School District served its Petition for Writ of Certiorari on Respondent Detroit Board of Education. In that Petition, the Bloomfield Hills School District noted, at page 4:

> "Disposition of the appeal in [the principal case of] *Bradley* [v *Milliken*] may render this petition moot. It is respectfully requested, therefore, that this petition for Writ of Certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*. Petitioner will promptly advise the Court of its desire to press this Petition or withdraw it, depending upon such final action by the Court of Appeals."

Subsequent to the December 8, 1972 decision in *Bradley*, the Court of Appeals for the Sixth Circuit granted a rehearing *en banc*, ... F2d ..... (CA6 January 16, 1973), and in so doing vacated the previous opinion of that Court in accordance with Local Rule 3 (b). This action resurrected the possibility that Petitioners' causes would become moot, should their positions be vindicated by the Court of Appeals *en banc*, a point which Petitioner Bloomfield Hills School District has once again recognized:

> "Since disposition of the appeal in *Bradley* may render its Petition moot, Petitioner reiterates its request that its Petition for Writ of Certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*." Supplement to Petition for Writ of Certiorari of Bloomfield Hills School District at 2.

Thus, once again, by Petitioners' own conceptions of the case, these Petitions for Writs of Certiorari are premature.

Accordingly, Respondent Detroit Board of Education submits this Supplemental Brief in Opposition to Certiorari

to respond to the Petitions which have arisen from somnolence through Petitioner Bloomfield Hills School District's Supplement to Petition for Writ of Certiorari.

II. NOT HAVING BEEN PARTIES TO THE PRINCIPAL LITIGATION IN THIS CASE, PETITIONERS WERE ABSOLUTELY WITHOUT STANDING TO APPLY FOR WRITS OF MANDAMUS AND/OR PROHIBITION.

By their own admission Petitioners were not parties to the principal litigation of *Bradley* v. *Milliken*. *See* Petition for Writ of Certiorari of Bloomfield Hills School District at page 3; Petition of West Bloomfield School District, *et al* at Page 4; Petition of School District of the City of Birmingham at page 6. It is submitted that Petitioners consciously and knowingly declined to intervene as parties-defendant in *Bradley*, unlike numerous other suburban school districts.

However, upon discovery that Petitioners were being included in a metropolitan plan of desegregation, they attempted to sue out a Writ of Mandamus and/or Prohibition in the United States Court of Appeals for the Sixth Circuit, which applications were denied by the Court of Appeals in July and August, 1972.

It is manifestly clear that the denials of the applications for the Writs by the Court of Appeals were correct, for the reason that the Petitioners were not parties to the principal cause of action in the District Court. Indeed, in a case turning upon substantially similarly procedural facts, *In re Heiloroner*, 69 F2d 643 (CCA2 1934), Judges Learned Hand, Thomas Swan, and Augustus Hand, in a *per curiam* opinion, precisely pinpointed petitioners' procedural defect:

"The Petitioners have not tried to intervene in

> the suit in the District Court, and are not therefore parties to it. . . . It is indeed true that any intervention must be 'in subordination to and recognition of, the propriety of the main proceedings', and some decisions construing it have gone as far as they assert. [citations omitted] We have never passed upon the point, and it is possible that we might construe the rule otherwise; at least it seems best to reserve any declaration regarding it. [citations omitted] We can still decide these applications, because though the rule means what they say, it does not justify a resort to prohibition. That Writ we may issue only in aid of our appellate jurisdiction. [citations omitted] *If it appeared that the entry of the order would deprive us of an appeal which might otherwise come before us, we might act. But it will not; at least it would not if the Petitioners had acted in season, had asked leave to intervene. Had they been admitted, they could have appealed; we are not to suppose that the District Court would have refused to allow them to intervene.* On that appeal we might hold that they could not raise the question which they wish to raise; if so, it would be because they could not raise it below. *Nevertheless, the appeal would search the correctness of everthing which they could challenge in the District Court".* 69 F2d at 644. Emphasis added.

Precisely the same situation is before this Court; Petitioners could have asked for leave to intervene at the District Court level.[2] That they chose not to do so can only be regarded as conscious acts, calculated by them, however erroneously, to serve their best interests. Nevertheless, *In*

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[2]c.f. Orders of Court of Appeals, denying applications for Mandamus and/or Prohibition, where it is stated in each order:

"This order is entered without prejudice to the right of the petitioner School Districts to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan."

Re Heilbroner stand as solid authority for the proposition that a Writ of Prohibition will not lie in the Court of Appeals at the instance of persons not parties to the principal litigation in the District Court. Petitioners not having been parties to ***Bradley*** v. ***Milliken,*** the Court of Appeals properly denied their applications for Writs of Mandamus and/or Prohibition.

III. THE PETITION FOR WRIT OF CERTIORARI PRESENTS PREMATURE ISSUES TO THIS COURT THE RESOLUTION OF WHICH SHOULD, IN THE INTEREST OF SOUND JUDICIAL DISCRETION, BE DECLINED AT THIS TIME.

In their Petitions for Writs of Certiorari, Petitioners raise two issues. The first is that the action of the District Court below deprived each petitioning school district of due process of law by ordering implementation of a plan of desegregating Detroit Schools by means of cross-district pupil transportation into, *inter alia,* the Bloomfield Hills School District, the West Bloomfield School District, the Birmingham School District, and the Clarenceville School District, despite the non-joinder of those Districts as parties. The second is that certain orders of the District Court in *Bradley* v. *Milliken* were jurisdictionally defective due to the Court's failure to convene a three-judge panel. In its letter to the Honorable Michael Rodak, Clerk of this Honorable Court, Petitioner Bloomfield Hills School District asserts that the decision of the Court of Appeals (since vacated for hearing *en banc*) in *Bradley* v. *Milliken* does not cure the District Court's denial of due process with respect to the Petitioner, since the Court of Appeals held "it will not be necessary for the District Court to find discriminatory conduct on the part of each school district,

either de jure or de facto, as a prerequisite to including such district in a desegregation area to be defined by the Court's degree," slip opinion at 68.

Both of these issues are prematurely raised before this Court. In the first place, should the Court of Appeals' decision of December 8, 1972 be reinstated or if a substantially similar opinion of the Court should issue, upon Petitioners' joinder as necessary parties at the District Court level, they may well find it desirable to raise both of these issues by objections to the District Court's jurisdiction. Even assuming *arguendo* that the District Court may rule contrary to Petitioners' position, they thereafter have available to them the conventional and proper means of appeal to properly object to such a decision.

Secondly, the very issues which Petitioners assert herein are once again before the Court of Appeals, to be determined by the whole Court sitting *en banc*.

Under such facts, where a determination of legal issues raised will in all likelihood be made by the Court of Appeals henceforth, it is established practice to decline to hear a case, on the grounds that a premature, and hence non-justiciable controversey is presented. Respondent recalls, to this end, the words of Justice Rutledge in *Rescue Army* v. *Municipal Court*, 331 US 549 (1947):

> "[*T*]*his Court has followed a policy of strict necessity in the disposing of constitutional issues* [*which*] *has not been limited to jurisdictional determinations.* For, in addition, 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' [citation omitted] Thus, those rules

> were listed in support of the statement quoted, *constitutional issues* affecting legislation *will not be determined . . . in advance of the necessity* of *deciding them; . . .*" 331 US at..... Emphasis added.

Under such a doctrine, Respondent Detroit Board of Education submits that the issues presented herein are prematurely raised in this Court. All such issues are before the Court of Appeals once again, to be argued and decided in the near future. Respondent Detroit Board of Education sees no "special and important reasons" (c. f. Supreme Court Rule 19-1) for granting certiorari instead of allowing the Court of Appeals to render its determination. *See* Supreme Court Rule 20 (writ of certiorari to review case pending in a Court of Appeals granted only on showing of great public importance justifying deviation from normal procedures).

Thus, even though it is submitted that this Court is without jurisdiction over the petitions for Writs of Certiorari, for the reasons the Petitioners were not parties to the principal case, as discussed above, the availability of other forums for determination of Petitioners' claims should preclude consideration of those claims by this Court "in advance of the necessity for deciding them." *Rescue Army* v. *Municipal Court, supra.*

CONCLUSION AND RELIEF

The petitioning School Districts not having been parties to the principal litigation involved herein, the Court of Appeals was without jurisdiction to issue Writs of Mandamus and/or Prohibition. Therefore, the decisions of the Court of Appeals to deny the applications were correct.

Further the pendency of the principal case herein, *Bradley* v. *Milliken,* in the Court of Appeals renders pre-

mature all claims contained in the Petitions for Writs of Certiorari.

For the above reasons, Respondent Board of Education of the School District of the City of Detroit respectfully prays this Court that the Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit, heretofore filed herein, be *denied.*

Respectfully submitted,
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